

Internal Revenue Service
memorandum

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date: JUN 28 1988

to: Joseph B. Boucree, Case Manager
Fred Schmitt, Revenue Agent

from: Director, Tax Litigation Division CC:TL

subject: Application of I.R.C. § 162(g) to the Deduction of Treble
Damage Payments by [REDACTED]

This is in response to your request for formal technical advice involving the above-captioned matter. We have discussed this issue extensively with both Joseph Boucree and Fred Schmitt of your office on a number of occasions.

ISSUE

Whether [REDACTED] is entitled to deduct two-thirds of the treble damages paid in settlement of civil suits, which resulted from a plea of nolo contendere to a criminal indictment alleging that [REDACTED] and other defendants conspired to rig bids in the [REDACTED] construction industry for the period [REDACTED] through [REDACTED] involving projects that were not specifically named in the original bill of particulars accompanying the indictment.

CONCLUSION

For the reasons discussed below, we believe that I.R.C. § 162(g) applies to all projects encompassed by the civil complaint and not just those listed in the original bill of particulars accompanying the criminal indictment.

DISCUSSION

On [REDACTED], the grand jury sitting in the United District Court for the [REDACTED] returned an [REDACTED] indictment against [REDACTED] and other defendants. [REDACTED] the indictment alleged a conspiracy in restraint of trade and commerce. The indictment stated that beginning at least as early as [REDACTED] and continuing thereafter until approximately [REDACTED] the defendant and co-conspirators engaged in a combination and

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conspiracy to suppress and eliminate competition in [REDACTED] construction in unreasonable restraint of interstate and foreign trade and commerce of the United States, in violation of Section 1 of the Sherman Act, Title 15, United State Code, Section 1. As defined in the indictment, [REDACTED]
[REDACTED]
[REDACTED].

[REDACTED] sold [REDACTED] construction services primarily to [REDACTED] companies which solicit bids and otherwise contract for the fabrication and installation of [REDACTED] structures and the [REDACTED]. [REDACTED] operates yards for fabrication of [REDACTED] structures and [REDACTED] bases primarily in and around [REDACTED] and [REDACTED], respectively.

[REDACTED] received bid solicitations for [REDACTED] construction from various customers located in and outside of the state of [REDACTED]. It prepared construction estimates and bids in [REDACTED] and [REDACTED] and sent bids in response to solicitations to customers located in and outside of [REDACTED] for construction to be performed outside of [REDACTED]. As set forth in the indictment, the conspiracy consisted of a continuing agreement between [REDACTED] and its codefendants by which they allocated among themselves [REDACTED] construction projects in the [REDACTED] and other geographic areas by submitting collusive, noncompetitive and rigged bids on [REDACTED] construction projects and by standardizing various terms and conditions under which the defendants were willing to offer their [REDACTED] construction services.

For the purpose of performing and effectuating the conspiracy, [REDACTED] and the other defendants discussed prospective [REDACTED] construction projects and the submission of prospective bids, selected the projects put out for competitive bids which they would and did make subject to the conspiracy, designated the low bidder on [REDACTED] construction projects, exchanged information concerning bid amounts or bid ranges on projects, submitted intentionally high or complimentary bids on [REDACTED] construction projects in which one of the defendants had been designated as a low bidder and submitted bids on projects which contained false, fictitious and fraudulent statements and entries. The effect of the conspiracy was to establish prices for [REDACTED] construction services at artificial and noncompetitive levels, to restrain, suppress and eliminate competition in [REDACTED] construction and to deny purchasers the benefits of free and open competition in contracting for the performance of [REDACTED] construction services.

The criminal indictment included an attached bill of particulars which listed each [redacted] construction project the Government would seek to show at trial was collusively bid to prove the conspiracy alleged in [redacted]. The list included [redacted] projects with bid dates starting on [redacted] and continuing through [redacted]. On the cover of the original bill of particulars is a note which states, "[redacted]

[redacted]."

In addition it states that the list is subject to correction, supplementation, and amendment to insure its accuracy.

On [redacted], [redacted] entered a plea of nolo contendere to the indictment returned by the grand jury in the [redacted]. The plea was to a single count felony violation of [redacted] of the Sherman Act. [redacted] agreed to pay a fine of \$[redacted], the maximum penalty for a corporation charged with such a violation. [redacted] also agreed to continue to provide the government with information in its possession relating to the matters charged in any indictment returned by the grand jury and not to oppose any motions under Rule 6(e), Federal Rules of Criminal Procedure. The Antitrust Division of the Department of Justice represented that it had no intention of any further criminal prosecution of [redacted] or any of its subsidiaries or affiliates on account of its activities in the [redacted] construction industry. There were no other limitations placed on the plea agreement regarding the time period or the matters involved.

The single count of the indictment charged [redacted] with conspiracy from early [redacted] until approximately [redacted]. Subsequent to, and as a result of the plea agreement, a number of [redacted] companies which had done business with [redacted] during this time period, individually filed civil complaints against [redacted] for the rigging of bids during the period [redacted] through [redacted]. These cases were eventually consolidated for pretrial proceedings in the United States District Court for the [redacted] under the caption "[redacted] [redacted]" also known as [redacted].

[redacted] eventually settled these cases by means of a formula agreed upon by the parties prior to the actual litigation of the civil claims. The general agreement called for [redacted] to pay a specific percentage on projects that were listed in the

original bill of particulars filed with the indictment plus a separate percentage for the other projects involved in the civil complaints. Even though different amounts were paid for the various projects, the time periods specified in the indictment and the civil complaints overlapped one another and included all the projects in question.

Your office informed us that on its income tax returns, ██████ sought to deduct two-thirds of the civil settlement payments for all bids other than those specifically listed in the original bill of particulars accompanying the indictment. It is their position that I.R.C. § 162(g) only applies to the settlement payments which were made for those projects specifically listed in the original bill of particulars. However, § 162(g) and the accompanying regulations apply to the settlement of any action brought under Section 4 of the Clayton Act which involves the same violation for which the taxpayer was indicted.

██████ has sought to distinguish the projects listed in the original bill of particulars accompanying the criminal indictment from the additional projects listed in the civil complaints which were bid prior to ██████. We believe that all of these projects were part of the same continuing conspiracy for which ██████ was indicted. In order to prove the charge of conspiracy, it is necessary to show the activities which were part of the conspiracy and that they occurred within five years of the indictment. The government's listing of specific projects in the bill of particulars was intended merely to show that these projects were collusively bid and were part of the affirmative actions which made up the conspiracy.

It must be remembered that ██████ was charged and pleaded nolo to one count of conspiracy. Neither the indictment nor the plea agreement entered into by ██████ limited the criminal activities solely to the projects listed in the original bill of particulars. While the Antitrust Division of the Department of Justice limited the original bill of particulars to projects with bid dates beginning on or after ██████, ^{1/} it stated specifically that a supplementary list providing the identity of projects bid prior to ██████ which the government might offer at trial as evidence against the defendants would be submitted to the defendants in the near future. It seems obvious that the Antitrust Division intended to include projects bid prior the

^{1/} The reason for this initial limitation might be that the evidence was fresher and, therefore, stronger for the later bids or they might have been concerned with the statute of limitations running before they could present evidence on all the rigged bids which occurred during the period of the conspiracy.

██████ as additional acts supporting the conspiracy charge in the indictment.

It is important to remember that what is involved in this case is a civil settlement based on the same violation for which ██████ was indicted. These are not related violations and, therefore, Treas. Reg. § 1.162-22 and Fisher Companies, Inc. v. Commissioner, 84 T.C. 1319 (1985) aff'd without opinion, 1987 CCH Vol. 10, p. 70,707 (9th Cir. 1986), are not controlling. Although there was no accompanying civil injunction obtained by the government, ██████ cannot limit the extent of the civil settlement as the taxpayer did in Fisher because these are the same violations and not related violations as determined by the court in Fisher. Moreover, the civil and criminal periods are essentially the same.^{2/}

Based upon the documents which you have supplied, it is our position that ██████ was indicted for conspiracy to rig bids from the period ██████ through ██████ and that its civil settlement of the "████████████████████" involves the same violation. We, therefore, recommend that the deductions for the settlement payments made for projects bid prior to ██████ on the Federal Income Tax Return of ██████, be denied.

If we can be of further assistance please contact Steven W. Ianacone at FTS 566-3407.

MARLENE GROSS

By:

DANIEL J. WILES
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^{2/} The court in Fisher was incorrect in its determination that the five-year statute of limitations applied to the taxpayer. The five-year statute merely requires that some act in furtherance of the conspiracy be committed within five years of the indictment.